

**TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING 04-17**

WARNING

Revenue rulings are not binding on the Department. This presentation of the ruling in a redacted form is information only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Departmental policy.

SUBJECT

Application of the Tennessee beer price posting law (Tenn. Code Ann. § 57-6-104) and the wholesale beer tax (Tenn. Code Ann. § 57-6-103) to the wholesale sale of beer to commercial airline carriers for service to customers while the airline operates in interstate commerce.

SCOPE

Revenue Rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue Rulings are advisory in nature and are not binding on the Department.

FACTS

Beer Manufacturer A sells beer to Tennessee licensed wholesalers for distribution throughout the State of Tennessee where such sales are legal.¹ A portion of these sales are subsequently distributed to commercial airline carriers at airports located in Tennessee.² Currently, the prices posted pursuant to Tenn. Code Ann. § 57-6-104 by

¹ It should be noted that a representative of Beer Manufacturer A has made this ruling request. The ruling given is a revenue ruling since: unnamed wholesalers are the taxpayers and no binding letter ruling can be issued to unnamed persons or persons who have not made the ruling request.

² The taxpayers and/or members of the public most concerned with the application of the law to the questions presented for ruling are: Beer Manufacturer A; the wholesalers to whom Beer Manufacturer A sells beer brands later sold to commercial airline carriers at airports located in Tennessee; the commercial airline carriers receiving such brands at Tennessee airports; and passengers purchasing such brands from such carriers while the latter are operating in interstate commerce. For purposes of this ruling, Beer Manufacturer A may also be referred to as BMA; BMA's wholesalers may also be referred to as Wholesalers or the Taxpayers; and the commercial airline carriers receiving BMA beer brands at Tennessee airports may also be referred to as Carriers.

wholesalers selling each particular BMA beer brand of a particular container size and container category or classification are the same, regardless of whether the purchasing retailers are commercial airline carriers at Tennessee airports or other retailers with Tennessee locations.

All of the BMA beer sold by wholesalers to commercial airline carriers at Tennessee airports is ultimately sold at retail by the applicable airline carrier to passengers for consumption while the carrier is operating in interstate commerce. Currently, the 17 % wholesale beer tax (payable pursuant to Tenn. Code Ann. § 57-6-103) is paid by wholesalers on all sales of BMA beer to commercial airline carriers who operate in interstate commerce.

QUESTIONS

1. Can wholesalers selling BMA beer to commercial airline carriers at airports located in Tennessee post different prices for a particular beer brand, container size and container category distributed to such carriers than for the same beer brand, container size and container category distributed to other retailers receiving beer at Tennessee locations without violating Tenn. Code Ann. § 57-6-104?³
2. Must the Taxpayers - wholesalers distributing BMA brand beers to commercial airline carriers at Tennessee airport locations - pay the 17% wholesale beer tax imposed by Tenn. Code Ann. § 57-6-103 on their wholesale sales even though such carriers are operating in interstate commerce and will only make their BMA beer brand retail sales while engaged in interstate commerce?

RULINGS

1. No.
2. Yes, because such sales by the wholesalers are Tennessee sales that are subject to the Tennessee wholesale beer tax under Tenn. Code Ann. § 57-6-103 and the Commerce Clause of the federal constitution does not prohibit state taxation of such transactions.

ANALYSIS

³ Alternatively stated, can beer wholesalers have one price list for wholesale sales of particular beer brands of a given container size and category distributed to commercial airline carriers at a Tennessee airport location and a separate price list for comparable sales to all other retailers receiving beer at Tennessee locations?

1. The Tennessee beer price posting statute - Tenn. Code Ann. § 57-6-104 - generally requires that beer wholesalers maintain and file price lists with the Department of Revenue and local tax collecting officials since the wholesale beer tax is applied to wholesale price. Wholesalers are also required to give notice of any revision of the list to the Department and other tax-collecting officials.

A wholesaler must refrain from sponsoring or participating in any price-cutting maneuver, device or promotion by changing its wholesale price of beer of a given brand, container and category⁴. Tenn. Code Ann. § 57-6-104(c)(1).

The statutory requirements of the filing of wholesale price lists, notice of price changes and limitations upon changes in price are for the purpose of insuring the collection of the wholesale beer tax and maintaining the integrity of the tax base for beer sales in Tennessee. These requirements were not enacted for the purpose of price maintenance and are not intended to establish a price maintenance device. See Op. Atty. Gen'l, November 30, 1981 (81-65); Op. Atty. Gen'l, April 5, 1982 (82-186).

The general rule is that a wholesaler's price for a particular brand of beer sold by "container" (i.e., container size⁵) and "category" (i.e., container category⁶) shall be fixed. Tenn. Code Ann. § 57-6-104(b).

In order for a wholesaler to fix its price pursuant to Tenn. Code Ann. § 57-6-104 on a given beer product that it sells to retailers, the wholesaler must consider only the beer product itself, not the wholesaler's customer (i.e., the retailer). The statute establishes only three recognized sub classifications of beer for purposes of determining the fixed price on a particular beer product: beer brand, container size and container category. Once a particular beer brand of a particular container size and container category is identified by the wholesaler, a "fixed" price for the product can be determined under the statute.

For example, the Wholesaler might establish a price of \$23.90 for BMA Light (brand), 12-ounce (container size) returnable bottles (container category) for a case that includes 24 bottles. This price would be the price the Wholesaler "lists" on its Wholesale Beer Price List for the BMA Light brand of such container size and category. This wholesale price must be fixed by the Wholesaler and must be "uniform to all retailers and all other persons" for that particular brand, container size and container category pursuant to Tenn. Code Ann. § 57-6-104(b).

In its essence, the question presented for ruling is whether a wholesaler can have one price for wholesale sales of a particular brand of beer of a given container size and

⁴ Tenn. Code Ann. § 57-6-104 establishes two significant classifications of beer for purposes of applying the beer price posting law to wholesaler pricing activities: "category" and "container."

Subsection (c)(1) defines "category" as "cans, returnable bottles, nonreturnable bottles, kegs and barrels" and defines "container" as "size in ounces".

The statute also includes a third significant classification of beer (i.e., brand) but does not define it.

⁵ See Tenn. Code Ann. § 57-6-104(c)(1).

⁶ Id.

category distributed to commercial airlines carriers at Tennessee airports and a separate price for wholesale sales of the same brand to all other retailers receiving beer at Tennessee locations without violating Tenn. Code Ann. § 57-6-104.

Tenn. Code Ann. § 57-6-104 does not create any type of sub classification of beer retailers for purposes of establishing the beer wholesale price posting requirements of Tennessee law. There is clearly no language that specifically relates to commercial airline carriers receiving beer from wholesalers at Tennessee airports. Furthermore, there is no language in the statute which generally suggests that beer price posting required by law should be in any manner connected to the type of retail establishment purchasing the beer from the wholesaler required to post its wholesale price.

However, the statute indicates that the wholesale price of beer charged by a particular wholesaler is to be uniform in nature for a given brand, container size and container category. For example, Tenn. Code Ann. § 57-6-104(b) provides in part that “[a] wholesaler shall not be permitted to file a wholesale price list that reduces the price of beer on quantity sales by brand, container and category even though the quantity wholesale price is uniform to all retailers and to all other persons . . .” (Emphasis added.) Additionally, Tenn. Code Ann. § 57-6-104(c)(1) provides in part that “[a] wholesaler shall not sponsor or participate in any price-cutting maneuver, device or promotion by changing the wholesale price of beer of a given brand, container or category . . .” (Emphasis added.)

Therefore, wholesalers selling BMA beer to commercial airline carriers at airports located in Tennessee may not post different prices for beer of the same brand, container size and category than for beer of the same brand, container size and container category they sell to other retailers located in Tennessee.⁷ A contrary interpretation could open the door to beer wholesalers’ defining their own sub classifications of retailers to whom they sell beer⁸ and establishing a separate price for the same brand, container size and container category for each classification. Since the courts have interpreted laws regarding intoxicating liquors against the liquor industry freedom to operate and in favor of the state’s exercise of control over the distribution of dangerous and heavily taxed commodities⁹, a contrary interpretation cannot be embraced.

⁷ If a wholesaler - who has a current (general market) posted price for a given beer brand of a particular container size and category – posts a different price for the same beer brand with the same container size and category, even though purportedly only for its sales to commercial airline carriers at airports located in Tennessee, the Department of Revenue would consider such posting a “price change” by the wholesaler of the particular brand and container size and category pursuant to Tenn. Code Ann. § 57-6-104. The wholesaler would then be held accountable for compliance with the price posting requirements stated in such statute as they relate to a price change.

⁸ Examples might include such specific classifications as professional sports teams, hotels and motels and private clubs and such general classifications as grocery stores (where beer is purchased and consumed off site) and bars, taverns or pubs (where beer is purchased and consumed on site). The list of possible sub classifications that might be defined by a particular wholesaler could go on indefinitely.

⁹ See Brown-Forman Distillers Corp. v. Olsen, 676 S.W.2d 567, at 572 (Tenn. App. 1984).

2. Tenn. Code Ann. § 57-6-103 imposes a tax on the wholesale sale of beer of seventeen percent (17%) of the price of the beer sold. This tax applies to wholesale sales of beer in Tennessee.

Wholesalers, such as the Taxpayers, who distribute beer to commercial airline carriers at airports located in Tennessee have made Tennessee wholesale sales that are subject to the Tennessee wholesale beer tax imposed by Tenn. Code Ann. § 57-6-103. The fact that the wholesaler's customers (i.e., commercial airline carriers) ultimately retail the beer purchased from the wholesalers to passengers for consumption while such carriers are operating in interstate commerce has no relevance to the wholesale beer tax since these events occur after the completion of the Tennessee wholesale sale that triggers the imposition of the wholesale beer tax.

The Commerce Clause of the federal constitutional does not prohibit the State of Tennessee from imposing a wholesale beer tax on beer sold at wholesale in Tennessee by BMA to commercial airline carriers at Tennessee airport locations.

Therefore, the wholesalers' current practice of paying the 17% wholesale beer tax on all sales of BMA beer to commercial airline carriers at Tennessee airport locations is consistent with Tennessee and federal constitutional principles of law.

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APPROVED: Loren L. Chumley
Commissioner

DATE: July 1, 2004